



State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095  
(603) 271-2147 FAX (603) 271-6588



Kevin Guay  
PO Box 10026  
Concord NH 03302

RE: Carter Hill Road, Concord NH

DES Wetlands File No. 2000-0201

ADMINISTRATIVE ORDER  
No. WD 02-044

December 4, 2002

**A. INTRODUCTION**

This Administrative Order is issued by the New Hampshire Department of Environmental Services, Water Division, to Mr. Kevin Guay pursuant to RSA 482-A:6 and RSA 485-A:17. This Administrative Order is effective upon issuance.

**B. PARTIES**

1. The New Hampshire Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH 03301.
2. Mr. Kevin Guay is an individual having a mailing address of P.O. Box 10026, Concord, NH 03301-2735.

**C. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS**

1. RSA 482-A authorizes DES to regulate dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. RSA 482-A:3, I states that "no person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
3. RSA 482-A:14, III provides that "failure, neglect or refusal to comply with [RSA 482-A] or rules adopted under [that] chapter, or an order or condition of a permit issued under [RSA 482-A], and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by [RSA 482-A] shall be deemed violations of RSA 482-A."
4. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, DES has adopted NH Administrative Rules Env-Ws 415 to implement this program.

5. Mr. Kevin Guay is the owner of the property located on Carter Hill Road, Concord, NH, more particularly described on City of Concord Tax Map 104, Block 2, as Lot 19 (the "Property").
6. On December 13, 1999, DES issued Notice of Proposed Administrative Fine and Hearing No. AF 99-88 (the "Notice") to Mr. Kevin Guay for the following violations occurring on the Property: dredging 24,525 sq. ft. of freshwater wetlands without a DES wetlands permit; filling 4,125 sq. ft. of wetlands without a DES wetlands permit; disturbing more than 200 linear feet of stream banks without a DES wetlands permit; and failing to install appropriate erosion controls, proper culvert headwalls and to properly stabilize disturbed areas.
7. On March 20, 2000, DES executed a Motion to Accept Settlement (the "Agreement") for the Notice. Of the \$4,600 fine proposed in the Notice to Mr. Guay, the Agreement suspended \$600 contingent upon satisfactory and timely restoration and no further violations by Mr. Guay for a period of two years from the date of acceptance of the Agreement. Additionally, the Agreement advised Mr. Guay that failure to comply with the terms of the Agreement would render the suspended portions of the fine due and payable upon notice by DES, without further hearing or appeal, and may result in referral of the violation to the NH Department of Justice.
8. On January 24, 2000, DES received a wetland restoration plan dated December 2, 1999, for wetland impacts detailed in the Notice (the "1999 Restoration Plan"). DES approved this 1999 Restoration Plan on March 31, 2000 with 20 specific conditions. Condition 20 of 1999 Restoration Plan approval (the "Approved 1999 Restoration Plan") required monitoring reports to be submitted after the first and second growing season, on or before October 15, 2000 and June 1, 2001.
9. On December 15, 2000, Gove Environmental Services ("Gove") submitted the first monitoring report required by the Approved 1999 Restoration Plan to DES informing DES that culverts may not have been installed at the locations approved on the restoration plans and recommending remedial measures including installation of an additional row of erosion control blankets on the Property.
10. On June 29, 2001, Gove submitted the second monitoring report required by the Approved 1999 Restoration Plan to DES recommending stormwater diversions on the southerly side of the entrance road leading up the hill. The purpose of these diversions was to decrease stormwater flow velocity and to direct this flow off the entrance roadway to prevent migration of sediment into wetlands at the bottom of the hill. No further information has been submitted to DES in reference to the restoration of impacted wetlands on the Property.
11. On May 5, 2002, DES issued Wetlands and Non-Site Specific Permit No. 2000-00201 (the "Permit") to Mr. Guay for the construction of a subdivision access road on the Property. The Permit authorized 4,855 sq. ft. of fill in wetlands at three crossings and the replacement of an existing 12 inch culvert with a 24 inch diameter culvert at the first crossing, to upgrade an existing woods road to a subdivision road for 5 building lots. Relevant conditions of the Permit include the following:

- a. Project Specific Condition 5 of the Permit required that "any further alteration of wetlands on this property will require a new application and further permitting by the DES Wetlands Bureau."
  - b. Project Specific Condition 6 of the Permit required that "orange construction fencing shall be placed at the limits of construction to prevent accidental encroachment on wetlands."
  - c. Project Specific Condition 8 of the Permit required that "there shall be no further alteration of wetlands for lot development, driveways, culverts, or for septic setback."
  - d. Project Specific Condition 12 of the Permit required that "appropriate siltation/erosion/turbidity controls shall be in place prior to construction, shall be maintained during construction, and shall remain until the area is stabilized."
  - e. Project Specific Condition 14 of the Permit required that "the permit holder shall ensure that a certified wetland scientist or erosion control specialist shall inspect the property at least weekly to ensure that the erosion controls measures are functioning and effective. Reports of these inspections shall be submitted to the DES and the Concord Conservation Commission."
- . General Condition 1 of the Permit required that "a copy of this permit shall be posted on site during construction in a prominent location visible to inspecting personnel."

13. On September 20, 2002, DES personnel inspected the Property and observed the following:

- a. Approximately 13,550 sq. ft. of wetlands were impacted between House Lot 7 and Lake View Drive, in excess of the impacts authorized by the Permit. Impacts included 2,600 sq. ft. of fill and 10,950 sq. ft. of dredge, and 300 linear feet of impacted stream channel.
- b. Silt fence was not properly installed adjacent to the impacted stream channel.
- c. Wetlands flagging, found on the ground, appeared to have been driven over by heavy equipment.

14. On September 24, 2002, DES personnel inspected the Property and observed the following additional deficiencies:

- a. The wetland impact area, described in 13a (above), appeared to be an unpermitted road ("Lake View Access") installed between Lake View Drive and the southeast bank of the man-made pond east of the house at lot 7 ("Pond 1"). The Lake View Access extended into wetlands on the Property at 3 locations. Mr. Guay informed DES personnel that he installed the roadway in that location because Concord Electric needed to access this location to install utility poles for the electric lines. Mr. Guay said that he

did not know that the area was wetland because his copy of the Plans was too small to read. A note on the Plans next to the area where the unpermitted road reads: "No access direct access (sic) from Lake View Drive to be permitted."

b. Wetland soils were stockpiled adjacent to the west end of the Lake View Access and a stream flowing between Pond 1 and the cattail pond located south of Pond 1 ("Pond 2"). Mr. Guay said he did not know these were wetland soils, but would ring the stockpiled soils with silt fence to prevent erosion.

c. The stream channel connecting Pond 1 and Pond 2, described in 13a (above) had been dredged and graded. Mr. Guay informed DES personnel that he had dredged in this area because Pond 1 was too low and he was hoping to increase its depth. All vegetation had been removed from this stream and the banks were dredged on both sides extending from approximately 30 ft. north of Pond 2 to the streams intersection with Pond 1. Silt fence had not been properly installed on either side of this stream. West of this stream channel, stumps and soils cleared from the uplands south of Pond 1 and house lot 7 were stockpiled in wetlands. Mr. Guay told DES personnel that he did not have a permit to work in the stream and had paid a \$4,000 administrative fine to DES and \$12,000 to Gove Environmental Services for restoration of a different stream on the Property.

d. The grassed banks of Pond 1 were excavated and dredged materials from Pond 1 appeared to be stockpiled on these banks. Mr. Guay said he had dredged Pond 1 and stripped the banks to create a sandy beach. Mr. Guay said he did not have a wetlands permit for impacting any banks of this pond. Mr. Guay told DES personnel that he did not think this area was wetland.

e. Orange construction fencing was not installed adjacent to wetlands on the Property. Mr. Guay said he did not know that the Wetlands Permit required the orange construction fencing, but informed DES personnel that he had had lots of fencing up during his restoration work on the northern end of the Property.

f. A culvert installed under the permitted south to north roadway at the western edge of the Property had transported sediment into the stream flowing into Pond 1. The stream was not flowing, but had sediment 1-3 inches deep extending approximately 20 linear ft. in its channel. Slopes leading down to this roadway were steep and unstabilized.

g. Some sediment was observed in wetlands on both sides of the permitted road (the "Permitted Roadway"), outside of the approved wetland impacts at the base of the Permitted Roadway. Silt fence was not properly installed and sediment was observed in wetlands on either side of the Permitted Roadway.

h. Proper headwalls were not constructed at the culvert extending under the Permitted Roadway. Sand was piled up around both the culvert inlet and outlet.

The Permit was not posted.

j. During this inspection, DES personnel went over the Plans and the Permit with Mr. Guay. DES personnel specifically asked Mr. Guay if he had complied with condition 14 of the Permit, which required that "the permit holder shall ensure that a certified wetland scientist or erosion control specialist shall inspect the property at least weekly to ensure that the erosion control measures are functioning and effective. Reports of these inspections shall be submitted to the DES and the Concord Conservation Commission." Mr. Guay responded that he had not had a certified wetlands scientist or erosion control specialist on the Property since early spring - he thought that condition 14 had expired. DES personnel informed Mr. Guay that the Permit expires on May 2, 2005 and that DES had not received any erosion control monitoring reports.

15. Based on these September 24, 2002, observations, DES personnel made the following verbal recommendations to Mr. Guay:

- a. Do not perform any additional work in wetlands on the Property without prior approval by DES.
- b. Stabilize disturbed areas with seed and mulch and install silt fence along the perimeter of non-impacted wetlands immediately.
- c. Retain a certified wetlands scientist to design a restoration plan for the Property to be submitted to DES for review and approval.
- d. Do not attempt restoration work in wetlands without the supervision of a wetlands scientist and the approval of DES.
- e. DES personnel granted Mr. Guay verbal permission to remove stockpiled soils and stumps from wetlands as long as the soils were only from uplands and no additional damage to wetlands occurred as a result of the removal process.

16. On September 26, 2002, DES personnel inspected the Property a third time. The purpose of the inspection was to measure the exposed area of impact to determine if the project required a site specific permit. During the inspection, DES personnel observed the following additional deficiencies:

- a. Wetlands on the Property were flagged. Wetland flags were found driven over on the ground south of the unpermitted roadway and were observed tied to trees near the stream channel located north of house lot 7.
- b. The area cleared and grubbed for the project measured greater than 100,000 sq. ft
- c. Sediment was observed in a stream at the northwestern edge of the Property.

17. On November 21, 2002, DES personnel inspected the Property. The purpose of the

inspection was to determine if restoration work on the Property was conducted in accordance with the Approved 1999 Restoration Plan. During the inspection, DES personnel observed the following:

- a. A culvert located under the permitted roadway approximately 125 ft. north of Carter Hill Road, was 20 feet longer than the Approved 1999 Restoration Plan authorized, and proper headwalls were not installed as specified in the Approved 1999 Restoration Plan.
- b. Two additional culverts, both intercepting seasonal seeps under the permitted north-south roadway at the western edge of the Property were not in accordance with the Approved 1999 Restoration Plan. Both culverts measured 30 feet long and 24 inches in diameter. The Approved 1999 Restoration Plan specified that culverts in this location should be 40 feet long and 18 inches in diameter. Proper headwalls were not installed on either of the culverts as specified in the Approved 1999 Restoration Plan.
- c. Per the monitoring report by Gove Environmental Services received by DES on June 29, 2001, stormwater diversions were to be constructed on the southerly side of the entrance road leading up the hill. These diversions were not constructed and fill was stockpiled in this location.

#### **D. DETERMINATION OF VIOLATIONS**

1. Mr. Guay has violated RSA 482-A:14, III, by failing to comply with Project Specific Condition 5 of the Permit requiring the permittee to obtain a permit for any further alteration of wetlands on the Property.
2. Mr. Guay has violated RSA 482-A:14, III, by failing to comply with Project Specific Condition 6 of the Permit requiring orange construction fencing to be placed at the limits of construction to prevent accidental encroachment on wetlands.
3. Mr. Guay has violated RSA 482-A:14, III, by failing to comply with Project Specific Condition 8 of the Permit, requiring that there shall be no further alteration of wetlands for lot development, driveways, culverts, or for septic setback.
4. Mr. Guay has violated RSA 482-A:14, III, by failing to comply with Project Specific Condition 12 of the Permit, requiring that appropriate siltation/erosion/turbidity controls to be in place prior to construction, to be maintained during construction, and to remain until the area is stabilized.
5. Mr. Guay has violated RSA 482-A:14, III, by failing to comply with Project Specific Condition 14 of the Permit, requiring the permit holder to ensure that a certified wetland scientist or erosion control specialist inspect the Property at least weekly to ensure that the erosion controls measures are functioning and effective. Reports of these inspections were to be submitted to the DES and the Concord Conservation Commission.

6. Mr. Guay has violated RSA 482-A:12, by failing to post the Permit on the Property.
7. Mr. Guay has violated RSA 482-A:3, I, by dredging 10,950 sq. ft. of wetlands on the Property without a permit.
8. Mr. Guay has violated RSA 482-A:3, I, by filling 2,600 sq. ft. of wetlands on the Property without a permit.
9. Mr. Guay has violated RSA 482-A:3, I, by impacting 300 linear ft. of stream channel between Pond 1 and Pond 2, without a permit.
10. Mr. Guay has violated RSA 482-A:3, I, by filling wetlands adjacent to the Permitted Roadway without a permit.
11. Mr. Guay has violated RSA 482-A:3, I, by impacting 20 linear ft. of stream channel flowing into Pond 1 without a permit.
12. Mr. Guay has violated RSA 482-A:3, I, by impacting an intermittent stream at the northwest end of the Property without a permit.
13. Mr. Guay has violated RSA 482-A:3, I, by placing fill on the banks of Pond 1 without a permit.
14. Mr. Guay has violated RSA 482-A:3, I, by dredging approximately 12,000 sq. ft. of Pond without a permit.
15. Mr. Guay has violated the Agreement by failing to comply with the Approved 1999 Restoration Plan.
16. Mr. Guay has violated RSA 485-A:17, by altering more than 100,000 sq. ft. of terrain on the Property without a permit.

#### **E. ORDER**

Based on the above findings, DES hereby orders Mr. Guay as follows:

1. **Immediately, cease and desist** all construction activities on the Property except for measures necessary to stabilize the site as specifically authorized by this Order.
2. **Immediately** retain a certified wetlands scientist to prepare and supervise implementation of a restoration plan for the unpermitted impacts to wetlands on the Property. This plan should be submitted to DES no later than December 27, 2002 and should at a minimum include:
  - a. Stamped, engineered plan with dimensions, drawn to scale showing:

- i. Existing conditions, with wetland boundaries; and
  - ii. Proposed conditions after removal of all unpermitted fill/sediment;
  - b. Proposed means of erosion control (silt fences, hay bales, etc.);
  - c. Planting plan for the stabilization and revegetation of the areas to be restored;
  - d. A construction sequence including equipment and methods for completion of the restoration, with site stabilization completed no later than December 18, 2002, and full restoration completed no later than May 1, 2003; and
  - e. A monitoring schedule, including two restoration progress assessment reports by a certified wetlands scientist to be filed with the DES wetlands bureau no later than January 20, 2003 and May 1, 2003, and a failure response strategy, for documenting the restoration of the impacted areas, through May 1, 2003.
3. **Immediately** retain a certified wetlands scientist or erosion control specialist to inspect the Property at least weekly throughout the remainder of the project to ensure that erosion control measures are functioning and effective as required by Project Specific Condition 14 of the Permit. Submit reports of these inspections to DES.
  4. **Immediately** post a copy of the Permit on the Property as specified by RSA 482-A:12.
  5. **Immediately** install orange construction fencing and silt fencing at the edge of all wetlands on the Property. Submit photos and written documentation of compliance with this requirement by December 20, 2002.
  6. **Within 30 days of this Order**, submit an after-the-fact site specific permit application for the project.
  7. **Within 30 days of this Order**, install culverts, headwalls, and stormwater diversions in accordance with the Approved 1999 Restoration Plan.
  8. Submit photographs and written documentation of compliance with all aforementioned requirements and conditions within five days of completion unless otherwise specified.
  9. Send correspondence, data, reports, and other submissions made in connection with this



Administrative Order, **other than appeals**, to DES as follows

Mary Ann Tilton  
DES Water Division, Wetlands Bureau  
6 Hazen Drive - P.O. Box 95  
Concord, NH 03302-0095

#### F. APPEAL

Any person aggrieved by determinations D.1 through 15 of this Order may apply for reconsideration with respect to any matter determined in this action within 20 days from the date of the Order. A motion for rehearing must describe in detail each ground for the request. DES may grant a rehearing if in its opinion, good reason is provided in the motion.

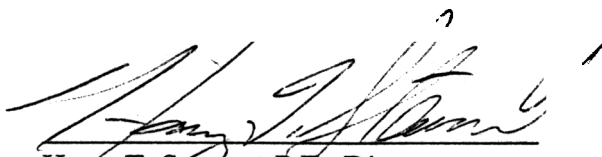
Any person aggrieved by determination D.16 of this Order may appeal the Order to the New Hampshire Water Council by filing an appeal that meets the requirements specified in Env-WC 200 within 30 days of the date of this Order. Copies of the rule are available from the DES Public Information Center on the web at <http://www.des.state.nh.us/desadmin.htm> or by telephone at (603) 271-2975.

Filing an appeal or motion for reconsideration of the Order will not automatically relieve Mr. Guay of his obligation to comply with the Order.

#### G. OTHER PROVISIONS

Please note that RSA 482:A, and RSA 485:A provide for administrative fines, civil penalties, and criminal penalties for the violations noted in this Order, as well as for failing to comply with the Order itself. Mr. Guay remains obligated to comply with all applicable requirements. DES will continue to monitor the Project for compliance with applicable requirements and will take appropriate action if additional violations are discovered.

This Order is being recorded in the Merrimack County Registry of Deeds so as to run with the land.

  
Harry T. Stewart, P.E., Director,  
Water Division

  
George Dana Bisbee  
Acting Commissioner

CERTIFIED MAIL #: 70993400000306889507

cc: Mark Harbaugh, DES Enforcement Coordinator  
Public Information Officer, DES PIP Office  
Rene Pelletier, Manager, Land Resources Management Program  
Mary Ann Tilton, WET/WD/DES  
Ana Ford, WQ/WD/DES  
Merrimack County Registry of Deeds  
Concord Code Enforcement Officer  
Concord Conservation Commission  
Concord Planning Board